Anachronisms by Law

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In an ongoing effort to combat online hate speech, the German Minister of Justice recently announced to examine the re-introduction of section 88a of the German Penal Code (hereinafter StGB). This law sanctioned the 'anti-constitutional endorsement of crime' and was only in force during a brief period between 1976 and 1981. It was supposed to counteract the spread of aggressive opinions and calls for violence. While politicians today are struggling with the issue of harmful online speech, one should refrain from re-introducing a law that was not only controversial back then but also ineffective. Apart from that, resurrecting the law in today's digital world raises numerous questions.

A highly restrictive and vague law

According to sec. 88a StGB, distributing, publicly exhibiting or creating, purchasing, delivering any type of written document that would fulfill the provisions of sec. 126 StGB, that is, the 'breach of the public peace by threatening to commit offenses', and that would be intended and suitable according to the circumstances to promote this type of threat. Making this type of document publicly available was punishable by up to three years of prison sentence, and the same applied to the endorsement of anti-constitutional behavior in public or in a gathering. Hence, endorsing someone else's announcement to perhaps breaching the public peace according to sec. 126 StGB was made a felony (acc. to sec. 12 StGB). Endorsement was later defined as 'an approval or affirmation of an action directed towards future acts as welcome, at least as necessary or as unavoidable'. Back then, the lawmakers' goal was to restrict the propagation of violence 'especially among young people' as a 'means of solving political, social and individual conflicts'. In 2018, the Bundestag's research service analyzed section 88a StGB and came to the conclusion that the law was not only possibly incompatible with the standards for speech-restricting laws but also ineffective since there was only one final judgment on its base.

(Historical) context matters

Section 88a was adopted in 1976 in a time where Germany was shaken by far-left groups such as the Red Army Fraction and the Revolutionary Cells, a time also known as the "German Autumn". After a series of violent events, that is, attacks, kidnapping, and assassinations, the German Parliament decided to not only sanction incitements to commit crimes, calls for violence, and other inciting offenses, but also the endorsement of the threat of committing certain crimes. The point of my argument here is not to compare the violent acts committed during the 1970s with today. Such comparison would not lead anywhere since it is still difficult to measure the effects on online hate speech on events of the analog world and because there are so far no certainties regarding the negative effects of social platforms on the

public debate (Emmer 2019). In addition to avoiding jumping to conclusions with regard to the comparability of the issues addressed, one should not underestimate the boomerang effect of a law restricting political opinions: according to hearings in Parliament in 1981, section 88a apparently damaged 'the reputation of criminal law and of the State' more than it stopped the endorsement of anti-constitutional announcements.

Avoid errors from the past

Re-introducing a speech-restricting law with a scope of application that was already too broad forty years ago would be another step along the lines of the German law against the spread of unlawful content on social media platforms, the Network Enforcement Act (hereinafter NetzDG). Not to say that the two laws are similar, they are fundamentally different. However, we can learn from the mistakes made in 2017. The NetzDG was passed in a legislative rush and rightly criticized by experts like UN-Special Rapporteur David Kaye (among others) for its potentially restrictive effects on freedom of expression. In essence, the criticism is about the NetzDG delegating too much power over the limits of free speech to social media platforms, and about creating incentives to remove content when it might be punishable under German criminal law. So far, the reports published by social media platforms do not contain any sign for over-blocking due to the NetzDG but the law serves as a model for other countries where freedom of expression and information might be less protected. In light of this precedent, there should be an awareness about adopting laws that have a speech-restricting effect, especially considering that section 88a StGB was removed in 1981 because it was deemed 'superfluous and harmful', not because it had reached its objectives.

Plenty of warning signs

Finally, there are too many constitutional pitfalls and unanswered questions. According to article 5 (2) Basic Law, freedom of expression and information can be restricted by general laws meeting the standards enshrined in the Basic Law and developed by the German Constitutional Court. Such laws need to be general, proportionate, and to comply with the interdependence doctrine ("Wechselwirkung") with regards to speech-targeting purposes. Re-enacting section 88a would require to define what a 'written document', 'public' or 'a gathering' are in the digital sphere. It would also need to be specific about how to define the act of endorsing on social media: would it suffice to "like" a post or would a share/retweet be necessary? At times when sharing and accessing information is one of the main accomplishments of social media platforms (even if they are under attack for their content moderation policies, at least since Cambridge Analytica), one should refrain from limiting in such manner what can be shared. In terms of proportionality, a new section 88a would need to be 'necessary', hence to fill a statutory gap that is not already sufficiently covered by other sections. However, there is no such statutory gap when you look at the offenses listed in sec. 1 (3) NetzDG: there are already numerous laws restricting speech and punishing speakers who insult (sec. 185 StGB), who call for sedition (sec. 130 StGB), who spread propaganda information about anti-constitutional

organisations (sec. 86 StGB), etc. Last but not least, it would require clarity about the actors involved: should social media platforms be in charge of detecting the anti-constitutional endorsement of offenses, strengthening their role as ‘custodians of the Internet’ (Gillespie 2018)? Should prosecutors be allowed to search social media platforms as if they were public spaces? Although the German legal system generally allows restricting speech (in comparison to the First Amendment), the lack of clarity and the abundance of questions in the present case should be perceived as a clear warning sign.
